82 - 2161

Docket No.

In the Supreme Court of the United States

October Term, 1982

FRED HICKS, JR.,
Petitioner

v.

APEX MARINE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S BRIEF

Louis H. Cohn, Esquire
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QUESTION PRESENTED

Was the petitioner denied his right to trial by a jury as afforded him by the Seventh Amendment of the Constitution of the United States, as a result of the Trial Court's questioning of the witnesses?

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. _____

Fred Hicks, Jr.,
Petitioner,

v.

Apex Marine Corporation,
Respondent

Petition for a Writ of Certiorari to

the Court of Appeals

for the Fourth Circuit

The Petitioner prays that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals, entered in the above case on March 14, 1983.

OPINIONS BELOW

The opinion of the United States District Court, Eastern District of Virginia, Norfolk Division, is not reported.

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on March 14, 1983, and a copy is appended to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

That part of the Seventh Amendment to the Constitution of the United States of America, which provided:

> In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This appeal involves a maritime personal injury proceeding under the Jones Act before the United States District Court, Eastern District of Virginia, Norfolk Division, Judge Robert G. Doumar presiding.

The petitioner was allegedly injured in an accident on board the respondent's vessel on October 18, 1980. Although the accident was reported the injury was not reported until some eight months later when the petitioner sought medical attention at the United States Public Health Service Hospital, Norfolk, Virginia. The material allegations contained in the petitioner's Complaint were denied by the respondent and the case was tried before a jury.

During the proceedings a motion for mistrial was made on behalf of the petitioner which was denied. The case was then submitted to the jury and the jury returned a verdict for the respondent, a motion for new trial was made and denied, whereupon an appeal was taken to the Fourth Circuit Court of Appeals which affirmed the decision of the Trial Court on March 14, 1983.

REASONS FOR GRANTING THE WRIT

Fred Hicks, Jr., the petitioner herein, was allegedly injured on the respondent's vessel. However, the accident was not immediately reported and medical treatment for the specific injuries complained of was not received until many months after the accident. Although the respondent, ship owner, was not able to offer any evidence as to the accident itself it did offer the testimony of a neurologist to show that the petitioner's claim was fabricated. Thus, although there was testimony from an alleged eye witness, the credibility of the witnesses testifying on behalf of the petitioner was most certinly the primary concern of the jury.

The sole complaint presented by

this appeal concerns the conduct of the Trial Court in questioning the witnesses. The Trial Court examined each of the petitioner's witnesses in such a way as to impress upon the jury the quality of the respondent's case. The Trial Court did not examine the respondent's witness, Dr. Levy. Yet, when the petitioner's witness, Dr. Ford, in effect contradicted Dr. Levy's testimony the Trial Court examined him on its own. Later, out of the hearing of the jury the Court stated: Transcript Page 17:

> "The reason I've got the Doctor out of here -- and I can see where I began to get into a problem -- because I couldn't feel like I was getting any answer from Dr. Ford. Now, I may have gone too far, and I really realize that."

The above quoted language of the Trial Court followed a suggestion by counsel for the petitioner, also made out of the hearing of the jury.

Transcript Page 16:

> "Your Honor, when I was cross-examining Dr. Levy, I apparently misquoted a question to him. Your Honor corrected me on it, framed it. I believe Your Honor did the same to Dr. Ford. I didn't have His Honor to correct the situation."

Later in the trial, during the testimony of Dr. Williams, a physician called by the respondent but initially retained by the petitioner, the Trial Judge again examined the witness to bring out testimony from that witness to impress the respondent's case upon the jury.

Transcript Page 22:

"THE COURT: You saw him initially at the request of Mr. Ermlich.

THE WITNESS: Yes.

THE COURT: The plaintiff's attorney?

THE WITNESS: Yes.

THE COURT: Doctor, you are a board-certified neurologist?

THE WITNESS: That's right.

THE COURT: And that means you have a specialty in neurology of at least five years' standing; isn't that correct?

THE WITNESS: It means that -- It means that I have had a three-year training program, and then you are obligated to wait a year before you take board examinations for that licensure.

THE COURT: Now, Doctor, in relation to post-concussion syndrome, is that your headaches or pains are greater after the accident and then deminish?

THE WITNESS: That's --

THE COURT: Is that correct?

THE WITNESS; That's typical, yes.

THE COURT: It wouldn't be that they be so insignificant at the beginning and later increase later on several months later; is that correct?

THE WITNESS: That's correct."

This questioning of Dr. Williams was not based on the testimony previously given but was in effect an effort by the Trial Court to bring out a point regarding the witness' testimony. The fact that this point was not based on any testimony previously

given and produced an answer detrimental to the petitioner's position clearly prejudiced the petitioner's case. Furthermore, the Trial Court acknowledged its error as indicated by the following portion of the transcript of the trial proceedings.

Transcript Pages 23 & 24:

> "Well, you may well be right, Mr. Radin. You can ask the Court of Appeals about it, because I'm not going to grant a mistrial, but I'll be happy to give any instruction to the jury, or call Dr. Williams back, that you think would suffice to cure your problems,--"

Furthermore, the Trial Court in effect indicated, beyond the presence of the jury, that it just did not believe the testimony of the petitioner's medical

expert. (Transcript Pages 24 & 25) Obviously, the Trial Court was not able to contain these feelings as to the petitioner's witnesses but expressed same to the jury.

In Quercia v. United States, Mr. Chief Justice Hughes, in commenting on the responsibility of the Trial Judge in the Federal Court offered a guide which the Trial Judge in the instant proceeding did not follow. Mr. Chief Justice Hughes in Quercia v. United States, supra, wrote:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is

> too important to be left without safeguards against abuses. The influence of the trial judge on the jury" 'is necessarily and properly of great weight'" and"' his lightest word or intimation is received with deference, and may prove controlling.'.." 53 S.Ct. 698,699

In Glasser v. United States, 62 S. Ct. 457,470, Mr. Justice Murphy wrote:

> "The judge conducting a jury trial in a federal court is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct'. Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L.Ed. 1321. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding..."

The conduct of the Trial Judge in the instant proceeding rather than obtaining or providing an air of impartiality opposed an aura of prejudice upon the petitioner. The Trial Judge choose to interrogate the petitioner's

medical witnesses in a manner which clearly indicated his lack of confidence in those witnesses. The petitioner's case rested almost entirely on the testimony of his medical witnesses and the questioning of these witnesses by the Trial Court was totally unnecessary. There was no vague answers nor was there any inability of respondent's counsel to obtain the answers to questions he offered. The questions of the Trial Court were solely for the purpose of making a point that the Trial Court desired and such was not within the province of the Trial Court.

The language in the opinion of Bollenbach v. United States, 66 S.Ct. 402, 405, offered additional authority that the decisions of the Trial Court as well as the Court of Appeals for the Fourth Circuit were in error.

In Bollenbach v. United States, supra, Mr. Justice Frankfurter wrote:

> "..The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States, 153 U. S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841, and jurors are ever watchful of the words that fall from him.."

The questioning of the Trial Judge in this case deprived the petitioner to his right of trial by jury.

CONCLUSION

For the reasons as set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

FRED HICKS, JR.,
Petitioner,

By _____
Of Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1645

Fred Hicks, Jr.,

Appellant,

v.

Apex Marine Corporation,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, District Judge.

Argued February 10, 1983
Decided March 14, 1983

Before RUSSELL, MURNAGHAN, and CHAPMAN, Circuit Judges.

M. J. Radin (Ermlich & Radin, P.C. on brief) for Appellant; John R. Crumpler, Jr. (Seawell, Dalton, Hughes & Timms on brief) for Appellee.

PER CURIAM:

In a Jones Act maritime personal injury proceeding, a jury trial resulted in a verdict for the defendant on which judgment was entered. The plaintiff, in appealing, has stated as his "sole complaint": "the conduct of the Trial Court in questioning the witnesses."

Under Rule 614 of the Federal Rules of Evidence, participation by the judge in the questioning of witnesses so that the truth may be ascertained is a matter of discretion. 10 J. Moore, Moore's Federal Practice Sec. 614.02 (2d Ed. 1982). Having reviewed the record in its entirety, we are satisfied that the questions put by the court did not exceed permissible limits nor deprive plaintiff of a fair trial. Cf. United States v. Billups, 692 F. 2d 320, 326-27 (4th Cir. 1982).

Furthermore, the district judge gave a curative instruction which effectively served to eliminate any prejudice of the sort plaintiff claims occurred:

> The Court further wants to advise the jury that nothing the Court may say or do during the course of the trial is intended to indicate nor should be taken as indicating what your verdict should be. It is your verdict, and you are to decide the facts, not what the Court may think or whatever you think the Court may think.
>
> The Court will instruct you as to the law and you decide the facts.

See United States v. Berardelli, 565 F. 2d 24, 30 (2d Cir. 1977).

Accordingly, the judgment is

AFFIRMED.

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-1041-N

FRED HICKS, JR.,	)	
	)	
vs.	)	JUDGMENT
	)	
APEX MARINE CORPORATION	)	

This action came on for trial before the Court and a jury, Honorable Robert G.Doumar, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Apex Marine Corporation, recover of the plaintiff, Fred Hicks, Jr., its costs of action.

Dated at Norfolk, this 17th day of June, 1982.

W. FARLEY POWERS, JR.
Clerk of Court

BETH T. WINGROVE
Deputy Clerk

Approved:

ROBERT G. DOUMAR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FRED HICKS, JR.,

Plaintiff,

v. Civil Action No. 81-1041-N

APEX MARINE CORPORATION,

Defendant.

ORDER

This matter comes before the Court on the plaintiff's motion for a new trial filed pursuant to Rule 59 (a) of the Federal Rules of Civil Procedure. The defendant has filed a response to the plaintiff's motion. The motion is DENIED.

In his complaint, the plaintiff, a seaman, has alleged that, as a result of the defendant's negligence and unseaworthiness of its vessel to which the plaintiff has been assigned, he

sustained a serious injury on October 18, 1980. A trial by jury ensued. Using a special verdict form prepared and agreed to by the parties and approved by this Court, the jury found that an accident involving the plaintiff had not occurred on October 18, 1980, and that the plaintiff had sustained no injury whatsoever on that date. The jury's finding by means of special interrogatory was tantamount to a finding of no liability on the part of the defendant.

In his motion, the plaintiff requests a new trial on the ground that the Court had severely prejudiced the plaintiff when it questioned two expert medical witnesses, in that such questioning tended to discredit the plaintiff's witness. The plaintiff had earlier advanced a similar ground in support

of his motion for mistrial in relation to the interrogation of one of the witnesses. That motion was denied. In its response to the motion presently before the Court, the defendant does not specifically address the propriety of the Court's manner of interrogation, but argues instead that since the jury found no liability on the part of the defendant, it would not have considered the issue of damages within which the physicians' testimony would necessarily have been subsumed. Therefore, the Court's questioning was unconnected to the jury's findings, and no possible prejudice could have inured to the plaintiff.

The decision whether to grant or deny a new trial is a discretionary matter with the Court. Krodel v. Houghtaling, 468 F.2d 887 (4th Cir.1972) cert. denied 414 U.S. 829 (1973). To

warrant the ordering of a new trial on the stated ground, the moving party must show that the Court's questioning was so prejudicial as to have exceeded the bounds of its unique posture as the only disinterested lawyer in the case whose primary duty is to see that the relevent facts are adequately developed for the understanding of the jury. Simon v. United States, 123 F.2d 80, 83 (4th Cir.) cert. denied, 314 U.S. 694 (1941).

Notwithstanding the Court's firm belief that its interrogation of the medical experts remained well within permissible bounds, the Court gave a prompt, cautionary instruction to the jury in order to ensure that no prejudice resulted to either party. Indeed, when the plaintiff moves for mistrial on the same ground, the Court declined to grant

such motion, but offered to give to the jury any reasonable cautionary instruction proposed by the plaintiff. Although given sufficient opportunity to prepare an appropriate instruction, the plaintiff submitted none to the Court. Nonetheless, the Court gave its own cautionary instruction, without objection, to the jury. The Court advised them that they should not consider the Court's questions or remarks as indicative of the Court's opinions as to any matter raised during the trial and that, in no event, should they be influenced in their decision of the facts by anything the Court said or did during the course of the proceedings.

The Court believes that its instructions clearly alleviated any possible prejudice which may have inured to the plaintiff as a result of its questioning

of these witnesses. See Rodriques v. Ripley, Inc., 507 F. 2d 278, 787 (1st Cir. 1974); Miles v. Sea-Land Service, Inc. 478 F. Supp. 1019, 1021 (S.D.N.Y. 1979) aff'd., 622 F. 2d 574 (2nd Cir.) cert. denied, 449 U. S. 954 (1980).

Having found no basis upon which to order a new trial in this action, the plaintiff's motion is hereby DENIED.

IT IS SO ORDERED.

ROBERT G. DOUMAR
United States
District Judge

At Norfolk, Virginia

July 13, 1982

DOCKET NO. 82-2161

In the Supreme Court of the United States

October Term, 1982

FRED HICKS, JR.,
Petitioner

v.

APEX MARINE CORPORATION
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION FOR COSTS UNDER RULE 49.2

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Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

QUESTION PRESENTED

The Petitioner frames the question presented in terms of a violation of the Seventh Amendment of the Constitution. At no time below did the Petitioner allege that the Seventh Amendment was involved in this case. (1a-11a). Hence, the Respondent is dissatisfied with how the Petitioner presents the issue and asserts that in truth there is no question for this Court to review.

STATEMENT OF THE CASE

Hicks was a merchant seaman who brought suit for damages and maintenance and cure as a result of personal injuries sustained on board the Respondent's vessel on October 18, 1980. The causes of action are based on the Jones Act, 46 U.S.C. Section 688 et. seq. and the general maritime law. The defendant denied that the plaintiff ever sustained an injury.

The case came on for trial with a jury on June 16-17, 1982, in Norfolk, Virginia, Judge Robert Doumar presiding. Hicks testified that on October 18, 1980, he fell backwards off a ship's ladder about nine feet landing on his head and back on the steel deck without breaking any skin. The plaintiff weighs 220 pounds.

Hicks claimed he suffered a concussion and the reason he got no immediate medical treatment was because of the delayed reaction of its effects. The issue therefore was whether a true brain concussion causes immediate or delayed pain.[1] Dr. Eugene Ford, a physician associated with the Marine Hospital saw Hicks in July, 1981, nine (9) months after the accident. Hicks was then complaining of headaches, dizziness, blurred vision, and pain in his knees. Dr. Ford supported the seaman's position. During the course of the court's examination of Dr. Ford, Petitioner's counsel stated he wished to make a "motion" out of the hearing of the jury. Thereafter, although no mistrial motion was made, the court and counsel exchanged views as to the propriety of the court's questions, resulting in Judge

1 Apex contended that if he really fell as claimed his head would have hurt immediately and he would have required treatment, at least first aid. Hicks contended that some concussions do not manifest themselves until months later.

Doumar saying that he was going to ask one more question: What symptoms normally follow a concussion? He then asked counsel for Hicks "Would this clear up the problem, Mr. Radin?" The response was "Yes, sir." The question was then asked and answered. No objection was made.

The next witness was Dr. Armistead Williams who examined Hicks at his attorney's request. He opined that because of the course of symptoms related by Hicks, he doubted his problem was purely post-traumatic syndrome.

Thereafter the jury retired for the day and Hicks' counsel moved for a mistrial based on the court's questioning of Dr. Williams. Judge Doumar denied the mistrial and offered to call Dr. Williams back to the stand for further questioning by Petitioner's counsel or to instruct the jury in any appropriate fashion. These offers were declined. (10a). Nevertheless, the following morning the court sua sponte admonished the jury to use its own judgment and not be influenced by statements of the court. (3a).

After closing argument the jury was asked inter alia the following special interrogatory:

"Did the plaintiff sustain an accident and injury on October 18, 1980, as alleged?

"If No, you may return to the courtroom.

After deliberating about fifty minutes the jury answered the first question "No" and returned to the courtroom. (4a-5a).

Hicks filed a motion for a new trial pursuant to Rule 59 which was denied in a decision and order of July 13, 1982. (6a-11a).

A Notice of Appeal was filed on July 21, 1982, argument was conducted on February 10, 1983, and the Fourth Circuit affirmed in a per curiam opinion dated March 14, 1983. (1a-3a).

ARGUMENT

HICKS' PETITION DOES NOT FIT WITHIN THE GUIDELINES OF RULE 17

The Petition for Certiorari makes no effort to present special and important reasons for obtaining a writ nor does it fall within the criteria of Rule 17.

The only issue presented "concerns the conduct of the Trial Court in questioning the witness" (Petition p. 6-7). This alone is not subject matter for Supreme Court review, and no special or compelling circumstances are cited. The Petitioner's argument is merely a rehash of the arguments made in the district court and in the circuit court.

It is argued here (Petition p. 15) that the trial judge deprived Hicks of his Constitutional right to trial by jury.[2] No cases are cited that support this bold proposition. If this were so here--assuming the trial court overstepped its bounds--it would be so in every case where the trial court erred in its admission (or rejection) of evidence or where a jury was not properly instructed because commenting on the credibility of a witness is no more or less crucial to the jury than for example prohibiting a piece of evidence for jury consideration. Hicks is equating right to a trial by jury with right to properly conducted trial by jury.

None of the cases cited by the Petitioner deal with the Seventh Amendment as it relates to the propriety of a trial judge commenting or making his opinion known as to the credibility of a witness.

Bollenback v. United States, 326 U.S. 607 (1946) deals with the administration of criminal justice and in particular the effect of an erroneous statement of law to the jury.

In Glasser v. United States, 315 U.S. 60 (1942) the Court approved the trial court's interrogation of witnesses and ruled that "[t]he extent of such examination rests in the sound discretion of the trial court." At p. 83.

Quercia v. United States, 289 U.S. 466 (1933) deals with the question of a trial court's comments on credibility but the Seventh Amendment is not mentioned.

There is no compelling or important reason to review this garden-variety personal injury case. The law is well settled that a trial judge's power to examine witnesses is a discretionary

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2 Query whether this action is one of "common law." See Crowell v. Benson, 285 U.S. 22 (1932).

one, 10 J. Moore, Moore's Federal Practice, Sec. 614.02 (2d Ed. 1982), and a reversal by this Court would give little guidance to trial and appellate courts. The problems involved vary widely from case to case. Only if this Court wishes to set a standard different from "discretion" would this case warrant certiorari.

Besides, what the trial judge did here was perfectly proper.

Hicks' sole complaint is the questioning by the court of certain "witnesses." They are not named as such but obviously they are Drs. Ford and Williams.

No particular question nor line of questions are quoted as being improper as far as Dr. Ford is concerned. Hicks' real complaint is that District Judge Doumar obviously did not believe this doctor. In view of his preposterous testimony, it is not surprising. Nevertheless, plaintiff's counsel never moved for a mistrial, nor did he request the jury be instructed or cautioned in any respect. Indeed, after Judge Doumar stated how he intended to resolve counsel's concerns, Mr. Radin agreed the problem was "cleared up." (266T). Thus, not only was a proper objection not made as required by F.R.E. 614(c), but moreover the plaintiff is now estopped from claiming the trial court erred.

The complaint concerning the court's questioning of Dr. Williams is based on the following questions:

> "THE COURT: Now, Doctor, in relation to post-concussion syndrome, is it that your headaches or pains are greater after the accident and then diminish?
>
> "WITNESS: That's --
>
> "THE COURT: Is that correct?
>
> "THE WITNESS: That's typical, yes.
>
> "THE COURT: It wouldn't be that they were so insignificant at the beginning and later increase later on several months later; is that correct?
>
> "THE WITNESS: That's correct."

The question is improper, Hicks argues, because it assumed Hicks' headaches were initially "insignificant." But there was ample evidence that Hicks' headaches were indeed "insignificant" at the outset and later became a problem.

Hicks' wife testified that his headaches were not as bad when he first came home and became worse as time went on. (311T-312T). Moreover she testified that in October, shortly after the fall when he was still on the vessel, his headaches were not as bad as they were when he later got home. (327T).

When at trial plaintiff was asked whether he mentioned his headaches to the vessel's Mate when he first got medical attention ashore in New Jersey, he said:

> "A. No I told him (mate) at that time that I wanted to see the doctor about my legs because they was still bothering me.
>
> . . .
>
> "Q. Was your head bothering you.
>
> "A. I was having the headaches, but I thought I was going to get all right, and mainly my concern at that time was my leg problems." (126T).
>
> "Q. You went to the doctor in Cherry Hill, New Jersey?
>
> "A. Yes.
>
> "Q. You didn't tell him a thing about your head, did you?
>
> "A. At that time my legs was what was really bothering me. That's why I went to the Public Health there. My head eased off a while. I had been taking different medications the mate had given me, and I was still continuing to try to work." (170T).

Another fact pointing to insignificant headaches at the outset is the testimony of the plaintiff admitting he did not even tell the Cherry Hill doctors about his alleged fall. (176T-178T).

And finally when he first got Public Health treatment in Norfolk after he left the vessel on November 12 and 20, a month after his fall, he did not mention anything about his head. (188T).

The above notwithstanding, the court realized it was getting close to the line and instructed the jury as follows after Dr. Williams' testimony:

> "The Court further wants to advise the jury that nothing the Court may say or do during the course of the trial is intended to indicate nor should be taken as indicating what your verdict should be. It is your verdict, and you are to decide the facts, not

what the Court may think or whatever you think the Court should think.

"The Court will instruct you as to the law and you decide the facts."

Any possible prejudice was effectively eliminated by this curative instruction. United States v. Billups, 692 F.2d 320 (4th Cir. 1982); see United States v. Berardelli, 565 F.2d 24, 30 (2nd Cir. 1977).

Rule 614 of the Federal Rules of Evidence states as follows:

"(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to the interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule (b) does not incorporate its own standard and thus we must turn to case law. See United States v. Kidding, 560 F.2d 1303 (7th Cir. 1977), cert. denied, 434 U.S. 872 (1977).

A review of applicable circuit courts of appeal decisions[3] reveals that the test is whether the court has assumed the role of an advocate. The function of trial judge is not to sit idly by

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3 United States v. Karnes, 531 F.2d 214 (4th Cir. 1976); United States v. Ostendorff, 371 F.2d 729 (4th Cir. 1967) cert. denied, 386 U.S. 982 (1967); United States v. Cole, 491 F.2d 1276 (4th Cir. 1974); Simon V. United States, 123 F.2d 80 (1941) cert. denied, 314 U.S. 694 (1941).

In the Fifth Circuit a new trial is awarded when there has been a "...blatant intrusion by the judge in the trial of [the] case which would lead to a fundamental miscarriage of justice." Mitchell v. M.D. Anderson Hospital, 679 F.2d 88, 92 (5th Cir. 1982).

In the Eighth Circuit a new trial is awarded only when "...the questions asked by the court were intended to suggest in any way or manner what verdict the jury shall find." United States v. Harris, 546 F.2d 234, 238 (8th Cir. 1976).

when he feels important points have not been fully developed. Here an important issue was whether Hicks' symptomatology was consistent with post-concussion syndrome. Because both counsel were apprehensive of what stringent cross-examination of the opposing doctor might bring out, there were questions left that needed to be asked.

> "...[A] federal district judge...is not a bump on a log, nor even a referee in a prizefight. He has not only the right, but he has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel." United States v. Ostendorff, supra, at 732.
>
> "It cannot be too often repeated, or too strongly emphasised, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting, He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself."
>
> "...[A]nd it is no ground of complaint that the facts so developed may hurt or help one side or the other." Simon v. United States, supra at 83.

The most that can be said here is that the court's questioning of the two medical witnesses gave the jury a clearer view of their conflicting opinion as to the nature of post-traumatic syndrome. At no point did the court, in front of the jury, express its opinion of the credibility of any of the witnesses.

MOTION FOR COSTS

The test under Rule 49.2 is whether or not the certiorari application is "frivolous." Frivolous is defined by Webster's New World Dictionary (Second College Edition, 1974) as "of little value or importance; trifling; trivial."

As reflected by the brief in opposition, the Petition is of little value and is trivial. The Fourth Circuit obviously thought so in view of its short per curiam decision. (1a - 3a).

No serious attempt has been made to fit the Petition for

Certiorari grounds within Rule 17. The fragile effort to characterize the issue as one of Constitutional importance is "trifling" and furthermore was never raised below. No explanation is given as to how a ruling by this Court in this case would further the administration of fairness and justice in the courtroom.

Apex, the Respondent, has been put to the expense of legal fees for preparation of its brief in opposition and has thus suffered damages. No remedy exists for restitution of the expense, already substantial, for defense in the courts below, but Rule 49.2 does provide relief for the expense incurred in this Court. Accord, Tatum v. Regents of Nebraska - Lincoln (82-6145), 51 LW 3883 (1983).

Attached hereto marked Exhibit A is an affidavit substantiating the fee charged.

THEREFORE, the Respondent prays for damages of $750 for attorneys fees in addition to normal taxable costs.

CONCLUSION

The Respondent prays that the Petition for a Writ of Certiorari be denied, and that it be awarded damages and costs.

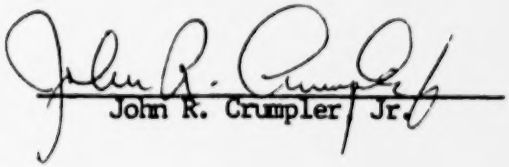
John R. Crumpler, Jr.
Counsel for Respondent

STATEMENT REQUIRED BY RULE 28:1

Respondent Apex Marine Corporation is a wholly owned subsidiary of Apex Resources, Inc., a privately held Delaware corporation.

CERTIFICATE OF SERVICE

I, John R. Crumpler, Jr., certify that on July 22, 1983, forty (40) copies of this Brief in Opposition were mailed to the Clerk of the United States Supreme Court, and three (3) copies were mailed or delivered to Melvin J. Radin, Esq., Suite 500, Holiday Inn Scope, Norfolk, Virginia 23510.



John R. Crumpler, Jr.

EXHIBIT A

AFFIDAVIT

I hereby swear that the legal fee charged to Apex Marine Corporation for preparation of the Respondent's Brief in Opposition is $750.

John R. Crumpler, Jr.

Subscribed and sworn to before me at Norfolk, Virginia, this 20th day of July, 1983.

Lucy R. Watters
Notary Public

My Commission Expires: May 13, 1986